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No. 89-1164

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

MARY A. CARLSON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

The reason why this case merits this Court's review is that the Fourth Circuit's decision spawns tremendous commercial uncertainty and wholly unnecessary litigation burdens for sellers of consumer products across the nation. The Fourth Circuit has cast into doubt *every* durational limitation of an implied warranty, despite Congress's intent to *clarify* the law by making such durational limitations generally enforceable, and has invited an outpouring of class-action lawsuits that Congress manifestly did not intend to foster. See Pet. 19-23, 24 n.15; see also MVMA Amicus Br. 5-8. It is no answer to say (Br. in Opp. 1, 2, 12) that the Fourth Circuit merely has given respondents an opportunity for a factual hearing. The very idea that a trial is necessary in this case because the "fundamental fairness of the bargaining process" is relevant (Pet. App. 17a)—but the length of the warranty is not (*id.* at 13a n.8)—is legally misguided and is the source of the serious mischief created by the decision below. See Pet. 10-19.

This Court has not hesitated to grant certiorari when a district court's dispositive ruling on an important issue of statutory interpretation has been erroneously overturned on appeal and the case remanded for further proceedings. See, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 110 S. Ct. 471 (1989); *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988); *United States* v. *Hohri*, 482 U.S. 64 (1987); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). In this case, as in the cited cases, a grant of certiorari and reversal of the erroneous ruling of the court of appeals would end the massive but unnecessary proceedings ordered by the court below.

Apart from trying to hide behind the Fourth Circuit's remand for further proceedings, respondents offer little to justify their assertion that the court of appeals' ruling does not warrant review. They claim that there is no

square conflict on the question presented (Br. in Opp. 6), yet they do not and cannot dispute that it will be open season on durational limitations of implied warranties if the decision below stands. Indeed, it can safely be predicted that the Fourth Circuit's decision will slow, if not forestall altogether, the development of a conflict, since enterprising plaintiffs will bring their nationwide class actions in districts within the Fourth Circuit so as to take advantage of the far-reaching precedent set by this case.[1] The question raised therefore is an important one, and nothing that respondents have said can obscure that fact.

When it comes to defending the decision below on the merits, respondents have no response to most of the points made in the petition. For example, they make every effort to disclaim rather than defend the express statement of the court of appeals that "an absence of 'meaningful choice[s]' and a substantial 'disparity in . . . bargaining power'" are, by themselves, "facts which, if proven, clearly would establish 'unconscionability.'" Pet. App. 14a; cf. Br. in Opp. 19-21. Nor do they defend the startling suggestion of the court of appeals that a warranty is conscionable only if it lasts the entire expected useful life of a product. Pet. App. 14a-15a. Instead, respondents' argument on the merits boils down to two points. They argue that the allegation that GM sold diesel engines while concealing a known defect sufficed to require a hearing on conscionability, no matter how inadequate the other bases of the Fourth Circuit's decision. And they argue that GM's position must be incorrect because it would read the word "conscionable" out of 15 U.S.C. 2308(b). Neither point can withstand scrutiny.

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[1] The brief in opposition itself (at 9-12) demonstrates that there already have been numerous nationwide class actions under the Magnuson-Moss Act. Each such action substitutes for hundreds of thousands of individual actions. Moreover, respondents' effort to denigrate the significance of the precedent below ignores the incentive that the Fourth Circuit's decision creates for a new tide of litigation by plaintiffs who otherwise would refrain from filing suit because of the unambiguous limitations of their warranties.

1. Respondents' principal argument in support of the Fourth Circuit's decision is that GM is guilty of "concealment" that somehow made it "unconscionable" to put *any* durational limitations on GM's implied warranties. Br. in Opp. 5, 6, 14, 20-22, 23.[2] Yet the boiler-plate rhetoric of "concealment" proves, on examination, to be nothing more than an allegation that GM knew—as every manufacturer knows—that some of its mass-produced products would eventually fail and did not somehow "warn" consumers of that obvious fact. Before the decision below, the law was clear that a manufacturer had an obligation to repair products that failed within a reasonable period of time as defined in the manufacturer's express warranty and an accompanying implied warranty that, under 15 U.S.C. 2308(a) and (b), could not be disclaimed during that period. But now, if the Fourth Circuit's decision stands, the law will be quite different: the very fact that a manufacturer knows that most product failures will occur after expiration of a reasonable time period prescribed in the warranty—and therefore conscientiously refrains from making unfulfillable promises of trouble-free operation after that period—will be converted into an excuse for branding its contract "unconscionable."

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[2] Respondents take considerable license with the undisputed facts of this case in trying to argue that GM's products were seriously defective and that the defects systematically manifested themselves soon after the warranties expired. In particular, respondents' own complaint shows that the time at which defects allegedly manifested themselves (if at all) varied widely, up to a high of 111,919 miles of trouble-free operation, and that the contention that respondents' engines failed "catastrophically" (Br. in Opp. i, 3, 22) is wildly overstated. No plaintiff in this case claims any personal injury; all respondents affected by the issues before this Court admit that they suffered no engine problems within their 24-month/24,000-mile and 36-month/50,000-mile warranty periods; and in the vast majority of cases respondents were able to repair their engines at relatively modest cost. See, *e.g.*, Amended Complaint, App. A, ¶¶ 1, 3, 4, 12, 13, 16, 17, 18, 20, 32. The description of respondents as "persons whose GM diesels failed, prematurely and catastrophically" (Br. in Opp. 3), is pure hyperbole.

Respondents cannot and do not deny that such a construction makes time/mileage limitations in warranty coverage meaningless. Indeed, respondents' object plainly is to bring about that result. But to do so is, as we showed in the petition (at 22-23), contrary to Congress's unmistakable intent in Section 108(b) of the Magnuson-Moss Act to permit durational limitations of implied warranties, and contrary to the Second Circuit's rationale in *Abraham* v. *Volkswagen of America, Inc.*, 795 F.2d 238 (1986).

Abraham demonstrates the fallacy of any theory that would render meaningless time/mileage limitations in express warranties, and Section 108(b) on its face demonstrates that Congress did not intend evasion of time/mileage limitations placed on implied warranties either. Based on *Abraham*, it is evident that the Second Circuit would not have reached the same result that the Fourth Circuit reached in this case.

By relying on *Abraham*, we do not, as respondents suggest (Br. in Opp. 6-8), seek to obscure the difference between express and implied warranties. Rather, our point —to which respondents have no answer—is that Congress linked the two in the Magnuson-Moss Act itself by permitting implied warranties to be limited to the same duration as the accompanying express warranties. See 15 U.S.C. 2308(b). It was Congress's affirmative intention that express and implied warranties normally have the same duration. See S. Rep. No. 876, 91st Cong., 2d Sess. 22 (1970) ("in a normal situation an express inconsistent warranty will control and determine the duration of the warrantor's concurrent implied obligations"). Thus, our reliance on congressional and judicial statements about express warranties is consistent with Congress's intent that implied and express warranties generally be coextensive. Respondents' strained effort to divorce the two simply ignores the statute Congress actually enacted.[3]

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[3] Nowhere is the strained nature of respondents' argument more evident than in their attempt (Br. in Opp. 16 n.17) to argue that

Respondents err in suggesting (Br. in Opp. 6) that the Fourth Circuit's unprecedented decision was somehow foreshadowed by *Martin* v. *Joseph Harris Co.*, 767 F.2d 296 (6th Cir. 1985). The holding in that case is that a finder of fact could find an outright *disclaimer* of all implied warranties (and most express warranties) to be unconscionable under Michigan law when a large national producer and distributor of seed sold small farmers seeds without applying, or disclosing its failure to apply, a disease-preventing treatment that had been standard for 26 years. In cases governed by the Magnuson-Moss Act, such an outright disclaimer of implied warranties is expressly forbidden (see 15 U.S.C. 2308(a)), but a durational limitation of implied warranties is expressly permitted (15 U.S.C. 2308(b)). There is no reason to believe that the *Martin* court would have extended its unconscionability holding to the quite different setting of this case, in which GM expressly warranted its products for up to 50,000 miles of operation and the implied warranties remained in place for the same period. To the contrary, the *Martin* court—unlike respondents and the court below—recognized that there is no unconscionability without a *substantively unreasonable* contract term. 767 F.2d at 300; see also *id.* at 304 (Merritt, J., concurring) (noting the requirement that contract terms be "both procedurally and substantively unconscionable"); see Pet. 16-19. Neither the Fourth Circuit nor respondents have identified any such substantively unreasonable contract term

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one-year (or even longer) implied warranties can be *unconscionable* merely because Congress declined an invitation to copy California's statute making one year the *maximum* permissible duration of an implied warranty. The fact that Congress, unlike the California legislature, chose to *permit* implied warranties lasting more than one year hardly is evidence that Congress believed longer warranties are unconscionably short. To the contrary, as we indicated in the petition (at 16 n.8), the determination of at least one state legislature to limit *all* implied warranties to one year is powerful evidence that the substantially longer implied warranties in this case are well within the bounds of conscionability.

in this case.[4] Thus, *Martin* does not support the decision below; it contradicts it.

Likewise, respondents are far off base in suggesting that other courts have invalidated durational limitations of implied warranties in Magnuson-Moss Act cases. No case, other than the decision below, has ever expressly questioned the enforceability of such durational limitations. To the contrary, many cases have upheld such durational limitations (see Pet. 11 n.5). The cases that respondents cite (Br. in Opp. 13 n.15) deal with settlements or class certification issues, not the substantive issue whether durational limitations of implied warranties are enforceable.

There is simply no basis, in the case law or in respondents' allegations of "concealment" of a "known defect," for holding that the complaint in this case contains allegations that, if proved, would establish unconscionability. The district court's dismissal of the unconscionability claims was sound and should have been affirmed.

2. Respondents portray us as "argu[ing] that the fairness of bargaining, including active concealment, is irrelevant to conscionability, as a matter of law." Br. in Opp. 14. That statement mischaracterizes our position. What we have argued, consistent with the legislative history of the Magnuson-Moss Act and a vast body of case law concerning the meaning of "unconscionability" at common law, is that unconscionability requires *both* inequality of bargaining power *and* unreasonable contract terms. The former by itself is *not* enough under *any* legislative or judicial definition of "unconscionability," yet the Fourth Circuit's opinion leaves the need for unreasonable contract

[4] Respondents make the wholly perplexing assertion that "'concealment of relevant facts' and consequent absence of 'meaningful choice' clearly qualify" as unreasonable contract terms. Br. in Opp. 21. But those alleged facts are features of the bargaining process, not contract *terms*. The contract *terms* at issue in this case are the provisions limiting implied warranties in duration to either 24 months/24,000 miles or 36 months/50,000 miles. Respondents do not even suggest that *those* contract terms were oppressive.

terms out of the equation entirely. It even goes so far as to conclude that an objectively reasonable contract term can be invalidated as unconscionable. Pet. App. 17a. Respondents cite not a shred of authority to support the proposition that contract terms may meet the test of reasonableness, yet somehow be unconscionable.

What respondents do instead is attack a series of arguments that we have not made. Respondents attack the straw-man argument that fairness of the bargaining process is *irrelevant* (Br. in Opp. 14), as opposed to our real argument that inequality of the bargaining process alone is *insufficient* to show unconscionability. Likewise, respondents attack the straw-man argument that the word "conscionable" should be read out of the Act (*id.* at 14-15), as opposed to our real argument that "conscionable" must be given an interpretation that accords with the legislative history, the plain intent of Section 108(b) to *permit* durational limitations, and the common law meaning of the term.

To be sure, the statutory requirement of "conscionable" warranty terms is partially coextensive with the requirement that the warranty be "of reasonable duration," *but that is a feature inherent in the statutory terms themselves.* If a statute invalidates actions that are "arbitrary [or] capricious" (see, *e.g.*, 5 U.S.C. 706(2)(A)), courts will not invent a new meaning for the word "capricious" merely to avoid overlap of statutory terminology. So too here, the statutory term "unconscionable," which has always required substantive unreasonableness (*e.g.*, *Restatement (Second) of Contracts* § 208 comment d (1981); *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)), should not be construed perversely to invalidate plainly reasonable contract terms merely because the statute also contains a separate ban on unreasonableness.[5] The legislative history of the Magnuson-Moss

[5] Although we contend that conscionability under 15 U.S.C. 2308(b) turns on the reasonableness of the contract terms limiting the implied warranty, rather than indeterminate questions about the fairness of the bargaining process, our position does not mean that

Act establishes that Congress intended to invalidate under Section 108(b) only those warranty limitations that would have been deemed unconscionable under common law principles. See S. Rep. No. 269, 92d Cong., 1st Sess. 18 (1971). Nothing in the legislative history suggests that Congress intended to strike down some previously-unheard-of class of "reasonable" but nonetheless "unconscionable" warranty terms.[6]

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the term "conscionable" in Section 108(b) is superfluous. It is not difficult to conceive of limiting contract terms whose conscionability could be questioned even though the duration of the express warranty was reasonable. For example, a manufacturer might expressly warrant an automobile for a reasonable duration yet condition the exercise of both express and implied warranty rights on the owner's changing the oil every 100 miles, or not driving more than 40 miles per hour, or notifying the company of any defect within 24 hours. Such onerous contract terms could give rise to questions about whether it is "conscionable" to limit the implied warranty in those ways, without the need to invent—as the Fourth Circuit has invented—a whole new meaning of the word "conscionable" that operates without regard to the traditional need for unreasonable contract terms.

[6] The legislative history cited in the petition (at 12-15) demonstrates that Congress's exclusive focus was on warranty duration, not on the "fairness" of the bargaining process without regard to duration. Respondents lamely answer our analysis of the legislative history by reiterating that the durational limitation must be both reasonable and conscionable—a point that we of course do not dispute—and by contending that the 1970 Senate report is somehow rendered irrelevant by the fact that, at a later point, the Senate passed a bill that did not contain the text of Section 108(b). Br. in Opp. 15-16 n.17. There is no merit to the latter point. The language of Section 108(b) originated in the Senate during the 91st Congress. Any effort to obtain insight into the meaning of Section 108(b) must take account of the contemporaneous explanation given at the time of its drafting, which is contained in the 1970 Senate report.

Contrary to respondents' contention, there is *no* legislative history that supports the Fourth Circuit's peculiar notion that even an objectively reasonable contract term can be invalidated as unconscionable. The hearing passages that respondents cite (Br. in Opp. 16 n.17) consist entirely of colloquies between various witnesses and a single legislator (Representative Eckhardt) who "ha[d] trouble with the whole section [108]," "d[id]n't know precisely what it

The Federal Trade Commission shares the view, supported by the common law meaning of "unconscionable" and the legislative history of the Act, that the focus of any unconscionability inquiry must be on the length of the warranty. See Pet. 13. It is true (see Br. in Opp. 16 n.17), but wholly irrelevant, that the Commission lacks authority to prescribe the duration of written warranties. 15 U.S.C. 2302(b)(2). The Commission *does* have authority to prescribe rules governing the content of warranties (15 U.S.C. 2302, 2309), to prescribe and enforce rules governing informal dispute settlement procedures under the Act (15 U.S.C. 2310(a)(2), (4)), and to bring injunctive actions to enforce the Act (15 U.S.C. 2310 (c)(1)). Performance of those statutory responsibilities has given the Commission staff considerable expertise, and the fact that the Commission (largely at industry insistence) lacks the additional power to prescribe minimum warranty terms is hardly a basis to disregard its expert view.

Ultimately, respondents' brief in opposition is an effort to defend an opinion different from the one that the court of appeals wrote, and to respond to arguments other than those made in the petition. The decision below says that durational limitations of implied warranties *can* be invalidated as "unconscionable" based on nothing more than disparity in bargaining power, and it does *not* require—

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attempts to have done * * * frankly," and repeatedly but unsuccessfully searched for alternatives (such as advance FTC approval) for the provisions of Section 108 as they then existed and ultimately were enacted. See *Consumer Warranty Protection: Hearings on H.R. 6313, H.R. 6314, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10673 (and similar and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 187-188, 203-204, 265-266 (1971); see also *id.* at 244-245, 391. Representative Eckhardt's remarks were aimed at changing Section 108, not interpreting it, and not a word that he said supports respondents' statement that anyone "understood that courts would be called on to examine extrinsic facts in deciding whether such limitations were conscionable." Br. in Opp. 16 n.17.

as all other authorities bearing on "unconscionability" do —that there be an unreasonable contract term in order for a court to find "unconscionability." Our argument is not that the word "conscionable" should be read out of Section 108(b), but that it should be given a meaning consistent with its legislative history, the plain purpose of Congress to *permit* durational limitations of implied warranties, and the established meaning of the term at common law. The decision of the Fourth Circuit is consistent with none of those touchstones of statutory construction, and it has far-reaching implications that respondents make no serious effort to deny.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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